Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-850-95
GOPAL SRI RAM, MOKHTAR SIDIN AND NH CHAN JJCA
10 SEPTEMBER 1996

Land Law *— Restraints on dealings — Caveats — Caveatable interest — Application for removal of caveat — Advancement of money to shareholder and director of company — Defendant claimed money was for investment on his behalf — Money utilized to purchase property in company's name — Whether a loan — Whether any resulting trust*

Land Law *— Restraints on dealings — Caveats — Estoppel — Defendant entered caveat on land title — High Court ordered removal of caveat — Defendant appealed to Court of Appeal — High Court made second order that company be at liberty to complete its sale of the property to purchaser in exchange for issuance of guarantee to defendant — Defendant did not appeal against second order — Purchaser became registered owner and sold land relying on second order — Court of Appeal decided that defendant had caveatable interest — Whether defendant by accepting the guarantee and permitting transfer elected to pursue his claim in money rather than in the land — Whether defendant estopped by his conduct from having the caveat re-entered against purchaser*

Civil Procedure *— Security — Jurisdiction — Payment of money as security to meet claim in suit against opposing party — Whether Court of Appeal had jurisdiction to make such order — Courts of Judicature Act 1964 s 69(4)*

On 17 June 1994, Medan Juta ('the first respondent company') sold two pieces of land in Cheras ('the property') to Ayer Hitam ('the second respondent company') for the sum of RM21m, pursuant to a sale and purchase agreement. The purchase price was to be settled by the issue of shares in the second respondent company. The second respondent company, however, did not enter a caveat to protect its position. On 2 May 1995, the appellant, who was a resident of Hong Kong, lodged his caveats on the titles. The appellant claimed that he had advanced HK$7m for investment on his behalf to one Jessie Loh, a director and shareholder of the first respondent company in which she held all shares but one. Accordingly, he argued that a resulting trust of the property under which Jessie Loh was the trustee, and he the beneficiary, was created. On the other hand, Jessie Loh claimed that the money was a loan given by the appellant to her to purchase the property in the name of the first respondent company, and that she had repaid a substantial part of the money in cash. The evidence of the transaction being a loan and of substantial repayment came from letters written by Jessie Loh to the appellant. However, against this, there were letters written by the appellant to Jessie Loh which spoke of an investment on his behalf. On 4 September 1995, the first respondent company took out an originating summons seeking an order to remove the caveats. The High Court judge

concluded that the transaction was a loan, and directed that the caveats be removed ('the first order') (see [1996] 1 MLJ 864). Following that, the appellant made an application for a stay of the first order, pending his appeal to the Court of Appeal. On the date of hearing of his application, counsel on both sides asked for an adjournment to make provision for the protection of the appellant's position pending the disposal of his appeal. The upshot was the judge made an order on 23 January 1996, inter alia, that: (i) the first respondent company do cause to be issued a bank guarantee, under which judgment sum would be payable to the appellant in the event that the appellant succeed in his appeal; (ii) the first respondent company be at liberty to complete its sale of the property to the second respondent company; (iii) in exchange for the issuance of the guarantee, there be no order made on the appellant's application; and (iv) nothing in the issuance and acceptance of the guarantee was to be taken as an admission by the appellant that he had consented to the sale of the property to Ayer Hitam ('the second order'). No appeal was made against the second order. At the hearing of the appeal against the first order, the appellant's counsel stated that although he accepted the offer of a guarantee, the appellant was not estopped from having his caveats replaced on the register as against the second respondent company, who was now the registered proprietor of the property. Counsel went on to argue that the balance of convenience or justice lay in favour of the appellant because the second respondent company, which had not paid across the full purchase price when the appellant's caveats went on the register, was not a bona fide purchaser. On the other hand, counsel for the respondents argued that the order of 23 January 1996 was to the express effect that the sale to the second respondent could be completed, and since the second respondent company had acted upon the order, there was no question of it being guilty of any inequitable conduct. It was further contended that the appellant had given up his right to re-enter his caveats and to pursue a claim *in specie*. The appellant's counsel had also applied for an order directing the first respondent company to pay the purchase price into court as security to meet the appellant's claim in his suit against the first respondent company. Counsel of the respondents resisted on the grounds that: (i) this court was not seised of jurisdiction under s 69(4) of the Courts of Judicature Act 1964 ('the Act') to make such order; (ii) the order proposed by the appellant would amount to an undue preference of the appellant as a contingent creditor; and (iii) as the appellant's appeal against the High Court's refusal to grant a Mareva injunction was still pending, it would seriously prejudice the respondents in the Mareva appeal if the Court of Appeal were to make any kind of preservation order. The two issues before the Court of Appeal were: (i) had the appellant, by accepting the guarantee and permitting the transfer to proceed, elected to pursue his claim in

A money rather than in the land?; and (ii) if the answer to the first question was in the affirmative, then, was the appellant estopped by his conduct from having the caveat re-entered against the second respondent company to whom the lands had, since the making of the order of 23 January 1996, been transferred?

B **Held**, allowing the appeal as against the first respondent company to the extent that the appellant had a caveatable interest in the property, but refusing to permit re-entry of the caveats by the appellant:

(1) The second respondent had, in good faith, accepted the order of 23 January 1996. The conduct of the appellant in all the C circumstances of the case constituted encouragement upon which the second respondent company acted. Suffice that it altered its position. There was no necessity that it did so to its detriment (see p 381G); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 followed.

D (2) It would be wholly unjust and inequitable to permit the appellant to contend that the caveats should remain as against the second respondent company which, in the light of the circumstances, was entirely innocent. There were other reasons which tilted the balance in favour of the second respondent company. It had entered into security arrangements with financial institutions to E raise funds to develop the lands and had effected sub-sales of subdivided plots to third party purchasers. If the court were to direct the re-entry of the caveat, the consequences would prove injurious to the second respondent company and other innocent persons (see pp 381H–I and 382A).

F (3) However, the appeal as against the first respondent company was allowed to the extent that the appellant had a caveatable interest in the property (see p 382B).

(4) The court agreed with the respondents' counsel that the power conferred by s 69(4) of the Act is confined to making ancillary G orders that would have the effect of completely giving the remedy which this court intends to give when either allowing or dismissing an appeal (see p 383A–B); *Rama Chandran v The Industrial Court of Malaysia* (Supreme Court Civil Appeal No 02–13–94) and *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* (Court of Appeal Civil Appeal No W–04–109–95) followed. H

(5) If the court were to make an order directing the first respondent company to provide security to meet the appellant's claim in the suit brought by him, it would most certainly have the effect of pre-judging the merits of his appeal against the refusal of a I Mareva injunction. Further, to direct the provision of security in this appeal would raise the spectre of undue preference in the appellant's favour (see p 383G).

(6) As for costs, taking into account all matters relevant to the exercise of the court's discretion, the court considered that the fair and just order that ought to be made in the circumstances of this case was to direct the first respondent company to bear all the costs of this appeal, including the costs of the second respondent company. The order of costs made in favour of the first respondent company by the High Court was set aside. The first respondent company was ordered to pay to the appellant the costs of the proceedings in the court below. The deposit paid into court by the appellant was ordered to be refunded to him (see pp 383I and 384A–B).

[Bahasa Malaysia summary

Pada 17 Jun 1994, Medan Juta ('syarikat penentang pertama') telah menjual dua bidang tanah di Cheras ('harta tersebut') kepada Ayer Hitam ('syarikat penentang kedua') untuk jumlah RM21 juta, menurut suatu perjanjian jual beli. Harga belian akan ditetapkan menerusi pengeluaran syer dalam syarikat penentang kedua. Namun demikian, syarikat penentang kedua tidak memasukkan kaveat untuk melindungi kedudukannya. Pada 2 Mei 1995, perayu, yang merupakan seorang penduduk Hong Kong, telah mengemukakan kaveat ke atas hakmilik. Perayu menuntut bahawa dia telah membayar pendahuluan sebanyak HK$7 juta untuk pelaburan bagi pihaknya kepada seorang yang bernama Jessie Loh, yang merupakan seorang pengarah dan pemegang syer syarikat penentang pertama dalam mana dia memegang kesemua syer kecuali satu. Ekoran itu, perayu berhujah bahawa suatu amanah berbangkit ke atas harta tersebut telah pun diwujudkan di bawah mana Jessie Loh adalah pemegang amanah, dan perayu sendiri adalah benefisiari. Sebaliknya, Jessie Loh mendakwa bahawa wang itu adalah suatu pinjaman yang diberikan oleh perayu kepadanya bagi membeli harta tersebut atas nama syarikat penentang pertama, dan bahawa dia telah pun membayar balik sebahagian besar wang itu dalam bentuk wang tunai. Bukti bahawa transaksi itu adalah suatu pinjaman dan sebahagian besarnya telah dibayar balik didapati daripada surat-surat yang ditulis oleh Jessie Loh kepada perayu. Namun demikian, terhadap bukti ini, terdapatnya surat-surat yang ditulis oleh perayu kepada Jessie Loh yang menyebut tentang pelaburan bagi pihak perayu. Pada 4 September 1995, syarikat penentang pertama telah mengambil suatu saman pemula yang memohon perintah untuk pembatalan kaveat. Hakim Mahkamah Tinggi membuat kesimpulan bahawa transaksi itu adalah suatu pinjaman, dan mengarah supaya kaveat dibatalkan ('perintah pertama') (lihat [1996] 1 MLJ 864). Berikutnya, perayu membuat suatu permohonan untuk penggantungan perintah pertama, sementara menunggu rayuannya kepada Mahkamah Rayuan. Pada tarikh pembicaraan permohonannya, peguam untuk kedua-dua pihak meminta penangguhan bagi membuat peruntukan untuk perlindungan

kedudukan perayu sementara menunggu penyelesaian rayuannya. Kesudahannya, hakim membuat suatu perintah pada 23 Januari 1996, antara lain, bahawa: (i) syarikat penentang pertama akan menyebabkan suatu gerenti dikeluarkan kepada perayu, di mana jumlah penghakiman akan dibayar kepada perayu jika perayu berjaya dalam rayuannya; (ii) syarikat penentang pertama bebas menyempurnakan jualan harta tersebut kepada syarikat penentang kedua; (iii) sebagai tukaran untuk pengeluaran gerenti, tiada perintah akan dibuat atas permohonan perayu; dan (iv) tiada apa dalam pengeluaran dan penerimaan gerenti itu harus dianggap sebagai pengakuan oleh perayu bahawa dia telah membenarkan jualan harta tanah tersebut kepada Ayer Hitam ('perintah kedua'). Tiada rayuan dibuat terhadap perintah kedua. Di pembicaraan rayuan terhadap perintah pertama, peguam perayu menyatakan bahawa walaupun beliau menerima tawaran gerenti, perayu tidak diestop daripada menggantikan kaveatnya atas daftar di mana ia berkaitan dengan syarikat penentang kedua, yang kini merupakan tuan punya berdaftar harta tersebut. Peguam terus berhujah bahawa imbangan kemudahan atau keadilan memihak kepada perayu sebab syarikat penentang kedua bukanlah pembeli bona fide kerana ia tidak membayar harga belian penuh apabila kaveat perayu didaftarkan. Sebaliknya, peguam penentang-penentang berhujah bahawa perintah bertarikh 23 Januari 1996 menyatakan dengan jelas jualan kepada penentang kedua boleh disempurnakan, dan memandangkan syarikat penentang kedua telah bertindak atas perintah itu, tiada persoalan timbul tentang apa-apa kelakuan yang tidak saksama. Ia selanjutnya dihujahkan bahawa perayu telah menyerahkan hak untuk mengemukakan kaveatnya semula dan untuk membuat tuntutan *in specie*. Peguam perayu juga telah memohon perintah yang mengarah syarikat penentang pertama untuk membayar harga belian kepada mahkamah sebagai cagaran bagi memenuhi tuntutan perayu dalam guamannya terhadap syarikat penentang pertama. Peguam penentang-penentang membantah atas alasan bahawa: (i) mahkamah ini tidak mempunyai bidang kuasa untuk membuat perintah sedemikian di bawah s 69(4) Akta Mahkamah Kehakiman 1964 ('Akta tersebut'); (ii) perintah yang dicadangkan oleh perayu sama seperti memberi keutamaan tak wajar kepada perayu sebagai si piutang kontinjen; dan (iii) oleh kerana rayuan perayu terhadap penolakan Mahkamah Tinggi untuk memberi injunksi Mareva masih menunggu penyelesaian, ia akan menjejaskan penentang-penentang secara serius dalam rayuan Mareva jika Mahkamah Rayuan membuat apa-apa jenis perintah pengekalan. Dua isu yang harus dipertimbangkan oleh Mahkamah Rayuan adalah: (i) adakah perayu memilih untuk membuat tuntutan dalam bentuk wang dan bukan dalam tanah apabila dia menerima gerenti dan membenarkan pindahmilik untuk diteruskan?; dan (ii) jika jawapan kepada soalan pertama adalah 'ya', maka adakah perayu diestop

melalui keperibadian daripada memasukkan semula kaveat terhadap syarikat penentang kedua yang telah pun memperolehi tanah tersebut menerusi pindahmilik sejak pembuatan perintah bertarikh 23 Januari 1996? A

Diputuskan, membenarkan rayuan terhadap syarikat penentang pertama sehingga takat perayu mempunyai kepentingan boleh kaveat dalam harta tersebut, tetapi menolak kemasukan semula kaveat oleh perayu: B

(1) Penentang kedua telah menerima perintah bertarikh 23 Januari 1996 dengan suci hati. Kelakuan perayu dalam kesemua keadaan kes merupakan galakan atas mana syarikat penentang kedua telah bertindak. Sudah memadai bahawa ia telah mengubah kedudukannya. Tiadanya keperluan bahawa ia berbuat demikian sehingga menjejaskan kedudukannya (lihat ms 381G); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 diikut. C D

(2) Adalah tidak adil dan tidak saksama pada keseluruhannya untuk membenarkan perayu berhujah bahawa kaveat harus dibiarkan terhadap syarikat penentang kedua, yang merupakan pihak ikhlas, memandangkan keadaan-keadaan ini. Terdapat alasan lain yang memihak kepada syarikat penentang kedua. Ia telah mengikat perkiraan cagaran dengan institusi kewangan bagi mengutip wang untuk memajukan tanah tersebut dan telah melaksanakan sub-jualan plot-plot yang telah dipecah bahagi kepada pembeli pihak ketiga. Jika mahkamah mengarahkan supaya kaveat dimasukkan semula, akibatnya akan memudaratkan syarikat penentang kedua dan pihak ikhlas yang lain (lihat ms 381H–I dan 382A). E F

(3) Walau bagaimanapun, rayuan terhadap syarikat penentang pertama telah dibenarkan sehingga takat perayu mempunyai kepentingan boleh kaveat dalam harta tersebut (lihat ms 382B).

(4) Mahkamah bersetuju dengan peguam penentang-penentang bahawa kuasa yang dikurniakan oleh s 69(4) Akta tersebut adalah terhad kepada pembuatan perintah sampingan yang akan mempunyai kesan memberikan remedi secara keseluruhan yang hendak diberikan oleh mahkamah ini sama ada apabila membenarkan atau menolak sesuatu rayuan (lihat ms 383A–B); *Rama Chandran v The Industrial Court of Malaysia* (Rayuan Sivil Mahkamah Agung No 02–13–94) dan *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* (Rayuan Sivil Mahkamah Rayuan No W–04–109–95) diikut. G H

(5) Jika mahkamah membuat perintah yang mengarah syarikat penentang pertama supaya memperuntukkan cagaran bagi memenuhi tuntutan perayu dalam guaman yang dimulakan olehnya, ia sesungguhnya akan mempunyai kesan pengadilan I

terlebih dahulu ke atas merit rayuannya terhadap penolakan injunksi Mareva. Selanjutnya, sebarang arahan mengenai peruntukan cagaran dalam rayuan ini akan menimbulkan bayangan keutamaan tak wajar yang memihak kepada perayu (lihat ms 383G).

(6) Berhubung dengan kos, dengan mengambil kira semua perkara yang relevan kepada pelaksanaan budi bicara mahkamah, mahkamah berpendapat bahawa perintah yang adil dan yang harus dibuat dalam keadaan kes ini adalah untuk mengarah syarikat penentang pertama supaya memikul semua kos rayuan ini, termasuk kos syarikat penentang kedua. Perintah kos yang dibuat memihak kepada syarikat penentang pertama oleh Mahkamah Tinggi diketepikan. Syarikat penentang pertama diperintahkan membayar kos prosiding di mahkamah bawah kepada perayu. Deposit yang dibayar ke dalam mahkamah oleh perayu diperintahkan dikembalikan kepadanya (lihat ms 383I dan 384A–B).]

[*Editorial Note*: The appellant has applied for leave to appeal to the Federal Court vide Civil Application No 08–73–1996(B) and the first respondent has applied for leave to appeal to the Federal Court vide Civil Application Nos 08–58–1996(B), 08–63–1996(B) and 08–75–1996(B).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419.

For cases on security, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2959–2962.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

Eng Mee Yong v V Letchumanan [1979] 2 MLJ 212

Hadmor Productions Ltd & Ors v Hamilton & Anor [1982] 2 WLR 322

Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors (Court of Appeal Civil Appeal No W–04–109–95)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng [1995] 1 MLJ 719

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294

Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7

Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52
Rama Chandran v The Industrial Court of Malaysia (Supreme Court Civil Appeal No 02–13–94)
Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin [1984] 1 MLJ 160
Tong Swee King v Pegang Mining Co Ltd & Ors [1967] 2 MLJ 214

Legislation referred to

Courts of Judicature Act 1964 s 69(4)
Rules of the Court of Appeal 1994 r 4
Rules of the Federal Court 1995 r 138
Rules of the High Court 1980 O 15 r 6(2)(b)
Rules of the Supreme Court 1980 r 51(4)

Appeal from: Originating Summons No 24–830–1995 (High Court, Shah Alam)

Wong Chong Wah (*Leong Wai Hong* with him) (*Skrine & Co*) for the appellant.

Cecil Abraham (*Logan Sabapathy* and *RS Nathan* with him) (*M David Morais*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This is an appeal against the decision of the High Court at Shah Alam. It is directed against the order of the judge directing the removal of caveats which the appellant had entered against the register documents of title to lands belonging to the first respondent. Two titles were involved. The appellant had, on 2 May 1995, entered a caveat on each title. The learned judge held that the caveats could not be sustained because the appellant had no caveatable interest.

In order to understand the course which the appeal has taken before us, it is necessary to deal with some of the salient facts and the relevant chronology of events.

The appellant was a resident of Hong Kong. He advanced various sums of money to one Jessie Loh, a director and shareholder of the first respondent which is a private limited company. In all, he gave her HK$7m. There was no dispute about this. But there was a dispute about the purpose of the payment. The appellant said it was for investment by Jessie Loh on his behalf. In other words, Jessie Loh was the trustee, and he the beneficiary, under a resulting trust of any property purchased with the moneys advanced. On the other hand, Jessie Loh said that it was a loan given to her and that she had repaid a substantial part of it. Her evidence was that she used the money to purchase the lands in question in the name

of the first respondent in which she, at all material times, held all shares but one. The lands were later charged to raise a loan for the first respondent.

On 17 June 1994, the first respondent entered into a sale and purchase agreement with the second respondent under which the lands in question were sold to and purchased by the second respondent for a sum of RM25m. The purchase price was to be settled by the issue of shares in the second respondent. Since the second respondent was a public limited company whose shares were listed and traded at the Kuala Lumpur Stock Exchange, the sale was subject to approvals being obtained from various regulatory bodies. One such body is the Securities Commission ('the Commission') which oversees the acquisition and disposal of assets of public listed companies. The Commission, having examined the proposed sale, reduced the purchase price to RM21m. It also adjusted the value which the parties had placed on the shares which formed the purchase consideration.

The sale and purchase agreement contained a clause which fixed the time within which the transaction was to be concluded. That time limit expired and the agreement lapsed on 15 May 1995, but was later extended by the parties thereto.

In the meantime, there was an exchange of correspondence between the appellant and Jessie Loh. The letters were in Chinese. They were to be found in the record provided, together with translations in English language. Among these was a letter dated 25 April 1995. It was from Jessie Loh to the appellant informing him that a half interest in the lands had been transferred to a third party whom she did not identify. There was a reply from the appellant. His letter was dated 1 May 1995. In it, he questioned Jessie Loh about the transfer. He asked why he had not been told of it earlier. A day later, that is to say, on 2 May 1995, the appellant lodged his caveats. At that time, the second respondent had not entered a caveat to protect its position under the sale and purchase agreement. Why the second respondent's solicitors who had conduct of the conveyancing failed to take this rather elementary step to protect their client's interest remains a mystery.

In due course, the first respondent became aware of the caveats. By a letter dated 29 June 1995, it informed the second respondent of the appellant's caveats.

On 4 September 1995, the first respondent took out an originating summons seeking an order to remove the caveats. The learned judge acceded to the application, and, as earlier observed, he directed that the caveats be removed.

In a carefully reasoned judgment, the learned judge, after examining the affidavits before him, concluded that the transaction was a loan.

Having correctly directed himself on the law by reference to the judgments of this court in *Luggage Distributors (M) Sdn Bhd v Tan Hor*

Teng [1995] 1 MLJ 719 and in *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, he said this (at pp 32–33 of the appeal record): A

> Pursuant to Form 19B exh P2 in encl (2), ie his application for entry of a private caveat, the defendant was asserting the existence of a shareholding trust held by Jessie in his favour as beneficiary. The defendant was not claiming that the plaintiff, as the registered proprietor, was holding the said lands in trust for him as beneficiary. The dispute is in effect one between the defendant and Jessie as an individual in relation to the shares owned by Jessie in the plaintiff, and not between the plaintiff and the defendant in relation to the said lands. B
>
> On the facts as adumbrated above, I am of the view that the defendant should pursue his remedies against Jessie personally arising out of a creditor-debtor relationship. Repayments have been made by Jessie towards the various remittances made by the defendant and there was indeed still an outstanding balance which gives the defendant a cause of action against Jessie, but it seems to me that vis-à-vis the land, there is no evidence before me that the remittances made by the defendant have been used by the plaintiff either wholly, exclusively, substantially or partly for the purchase of the said lands. Hence, the defendant, as caveator, has not discharged the onus of proving that he is beneficially entitled under any trust affecting the said lands or interest as contained in s 323(1)(b). In the circumstances, I am of the view that the caveator has no caveatable interest and so the caveat must be removed. I, therefore, make an order in terms of this application. C D

At the hearing of this appeal on 6 August 1996, Mr Wong Chong Wah of counsel for the appellant, carefully took us through the evidence in the record provided, and demonstrated that the only evidence of the transaction being a loan, and of substantial repayment, came from letters written by Jessie Loh to the appellant. Against this, there were letters written by the appellant to Jessie Loh which spoke of an investment on his behalf. Mr Wong also drew our attention to the evidence relating to the mode in which the alleged repayment was made. According to Jessie Loh, she made two payments of HK$1m each in cash in Hong Kong. She had produced no document signed by the appellant acknowledging receipt of these sums. We are unable to see any difficulty in her getting an acknowledgment for these large sums of money, if indeed she had paid them across to the appellant. E F G

Mr Abraham of counsel for the respondent, made the following submissions in reply to those made by the appellant. First, he submitted that this is a case where the learned judge had correctly applied the law in determining whether the appellant had a caveatable interest. Secondly, he argued that the learned judge had carried out an evaluation of the evidence and arrived at the conclusion that the transaction was a loan and not a trust. Since the judge had made no demonstrable error, this court, whose initial jurisdiction in an appeal of this nature is one of review only (see *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1982] 2 WLR 322), ought not to interfere with the exercise of his discretion (see *Eng Mee Yong* H I

v V Letchumanan [1979] 2 MLJ 212; *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin* [1984] 1 MLJ 160).

At the conclusion of argument, we informed counsel that we would reserve our decision to the following morning, but that in the meantime, they were at liberty to put in a written note on any further points they wished to raise but had overlooked during the course of oral submissions. Mr Abraham then put in a note of submissions in which he drew our attention to the proceedings before the learned judge on the appellant's application for a stay of the order directing the removal of the caveats.

The note recorded by the learned judge showed that on the date on which the appellant's summons for a stay came on for hearing, counsel on both sides had asked for an adjournment to make provision for the protection of the appellant's position pending the disposal of his appeal to this court. The upshot was an order made by the learned judge on 23 January 1996 in the following terms:

(1) the plaintiff (the first respondent before us) be at liberty to complete its sale of the lands known as EMR No 3116 Lot No 1536 and CT No 9098 Lot No 1092 both in the Mukim of Cheras ('the said lands') to Ayer Hitam Tin Dredging (M) Bhd ('Ayer Hitam') (the second respondent in the appeal);

(2) that in the event the plaintiff's sale to Ayer Hitam is not completed, the plaintiff shall not sell the said lands to others pending disposal of the defendant's appeal to the Court of Appeal;

(3) that the plaintiff do cause to be issued a guarantee to the defendant in terms of the draft annexed hereto and marked 'App 1';

(4) in exchange for the issuance of the said guarantee, there be no order made on the defendant's said application herein;

(5) nothing in the issuance and acceptance of the said guarantee is to be taken as an admission by the defendant that the defendant has consented to the sale of the said lands to Ayer Hitam; and

(6) that the parties be at liberty to apply.

It was common ground that the guarantee of which the order speaks was accepted by the appellant. The guarantee in question was issued by Perdana Merchant Bankers Bhd. It was dated 19 January 1996, addressed to the appellant and was in the following terms:

Bank Guarantee

1 We have been approached by Medan Juta Sdn Bhd ('the company') to provide to you a guarantee. In this respect, we are instructed that the genesis relating to this guarantee is as follows:

(a) the company is the registered proprietor of the lands held under EMR No 3116 Lot No 1536 and CT 9098 Lot No 1092 both of Mukim of Cheras ('the said lands') and that vide Presentation No

1382/95 Jilid 108 Folio 53 and Presentation No 12351/95 Jilid 27 Folio 60 ('the said caveats'), you had caveated the said lands; A

(b) you had, on 2 August 1995, filed a suit in the Kuala Lumpur High Court vide Writ No S2–22–302–95 ('the KL suit') against the company and one Jessie Loh Lai Ngoh ('Jessie Loh') for, inter alia, a declaration that you are beneficially entitled to the said lands. An application has been filed by you to transfer the KL suit to Shah Alam and this application is fixed for hearing on 9 February 1996; B

(c) upon an application of the company vide Shah Alam High Court Originating Summons No 24–830–95 ('OS No 830'), the Shah Alam High Court on 15 December 1995, ordered the removal of the said caveats ('the said order'). In respect of the said order, you have, on 20 December 1995, through your solicitors, Messrs Skrine & Co lodged an appeal to the Court of Appeal Malaysia against the said order ('the said appeal'); C

(d) pending disposal of the said appeal, you have made an application to stay the enforcement of the said order; and

(e) the company intends to deal with the said lands in favour of Ayer Hitam Tin Dredging Malaysia Bhd ('Ayer Hitam'). D

2 WE HEREBY UNDERTAKE AND GUARANTEE you as follows:

(a) to pay on your written demand a sum not exceeding the sum of RM5,000,000 SUBJECT ALWAYS to the following terms and conditions: E

(i) that the company has completed the sale of the lands to Ayer Hitam and that for the purposes of completion, the same shall be treated as having arisen upon the presentation of the relevant memorandums of transfers with the land office;

(ii) that the said appeal is allowed in your favour; and

(iii) that the obligation to pay such sum is determined and the amount of such sum quantified by the High Court in the KL suit, or by the Shah Alam High Court to which the KL suit has been transferred to, and/or the Court of Appeal and/or the Federal Court as the case may be, and judgment for such sum has been duly entered against the company and/or Jessie Loh. F G

3 A sealed copy of the decision or judgment of 2(a)(ii) and (iii) above served on us together with your written demand shall constitute an effective determination of our liability under this guarantee.

4 Our said guarantee shall be irrevocable and continue in effect until the said appeal is withdrawn by you or is dismissed by the Court of Appeal of Malaysia subject always that in the event we do not renew this guarantee upon the expiry, and the events under cl 2 have not arisen, you shall be entitled within 30 days from the said expiry to demand from us and we shall effect payment of a sum of RM5,000,000 to Messrs Logan Sabapathy & Co, Advocates & Solicitors, Suite 2002, 20th Floor, Wisma Hamzah-Kwong Hing, No 1 Leboh Ampang, 50100 Kuala Lumpur, who shall hold the said sum as stakeholders to abide the events set out under cl 2 of this guarantee. H I

5 Subject to your rights under cl 4 hereof, this bank guarantee is valid for one year from the date of issuance and expires on 19 January 1997 unless renewed on a yearly basis. Upon expiry, this guarantee is to be returned to us for cancellation. Notwithstanding whether you have returned the same to us or not, our liability under the aforesaid guarantee shall, subject to the said cl 4, be absolutely discharged thereafter.

Given under our hand on 19 January 1996.

Signed etc.

Having given the matters raised our due consideration, we formed the view that we required further assistance from counsel upon the effect, if any, which the appellant's acceptance of the guarantee had on his appeal. Accordingly, when the appeal was called on for the pronouncement of our decision on the morning of 7 August 1996, we informed counsel of the two related questions that had arisen overnight. They are as follows.

First, had the appellant, by accepting the guarantee and permitting the transfer to proceed, elected to pursue his claim in money rather than in the land?

Second, if the answer to the first question is in the affirmative, then, is the appellant estopped by his conduct from having the caveat re-entered against Ayer Hitam to whom the lands had, since the making of the order of 23 January 1996, been transferred?

Having formulated the issues upon which we required assistance, and having drawn the attention of counsel to the decision of the Privy Council in *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7, we stood down further hearing of the appeal to noon on the same day. At the resumed hearing, we heard argument on the two questions raised. We must say at once that, for reasons that will become apparent, the appellant had satisfied us, at the conclusion of submissions on 6 August 1996, that he had a caveatable interest *as at the date of the entry of the caveats*. What we were concerned about was the appellant's conduct post-judgment giving rise to the two questions earlier formulated.

After having heard Mr Wong Chong Wah on the appellant's behalf, and Mr Abraham on behalf of the first respondent, we were satisfied that as between the appellant and the first respondent, the balance of justice certainly swung in the former's favour in having the caveat restored to the title. But that was not the end of the matter. The problem had been compounded by the transfer of the lands to Ayer Hitam. Any order that we were prepared to make at that stage would have most certainly resulted in serious prejudice to Ayer Hitam as the transferee, and it was not before us. We therefore considered it essential, as a matter of natural justice, that we should have evidence from Ayer Hitam and hear counsel on its behalf before finally deciding where the justice of the case lay.

Therefore, in order to achieve the ends of justice, we made the following orders and gave the following directions:

(i) that the appeal be allowed to the limited extent that the caveats be restored to the register documents of title until further order of this court;

(ii) that Ayer Hitam be added as a second respondent to the appeal;

(ii) that the title to this appeal be amended accordingly;

(iii) that the appellant do forthwith, that is to say, before the close of business on 7 August 1996, serve a copy of the record of appeal on solicitors for Ayer Hitam; and

(iv) that Ayer Hitam as the added second respondent be at liberty to file an affidavit in support of its case.

This court has ample jurisdiction under O 15 r 6(2)(b) of the Rules of the High Court 1980 read with r 4 of the Rules of the Court of Appeal 1994 to make these orders. See *Tong Swee King v Pegang Mining Co Ltd & Ors* [1967] 2 MLJ 214, affirmed *sub nom Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52.

The appeal was then adjourned to 16 August 1996 to hear arguments from the second respondent as to why the caveats should not continue to remain on the register of the lands of which it was now the registered proprietor.

When the appeal came on for continued hearing, we had an affidavit from the second respondent which the appellant had replied. In the light of the fresh material that was now before this court, we invited, with the agreement of all counsel, Mr Wong Chong Wah to argue the appeal against the second respondent.

Mr Wong, with his usual candour, readily accepted that he had one of two choices to make at the hearing of his summons for a stay before the learned judge. He could have either insisted on going forward with his application, or he could have accepted the offer of a guarantee. Although he decided upon the latter course, the appellant was not estopped from having his caveats replaced on the register as against the second respondent.

Counsel went on to argue that the balance of convenience, or, more appropriately, the balance of justice, lay in favour of the appellant and against the second respondent. Relying upon the decision of the Supreme Court in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, and of this court in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, Mr Wong submitted that the second respondent was not a bona fide purchaser because it had not paid across the full purchase price when the appellant's caveats went on the register. Once that proposition was accepted, then the second respondent cannot rely on any equity said to be arising in its favour.

So much for Mr Wong's submissions.

When Raja Aziz rose to address us on behalf of the second respondent, we asked him to confine his reply only to two points. First, the matters that transpired before the learned judge at the hearing of the appellant's summons for a stay, and in particular, the interpretation that was to be placed upon the appellant's acceptance of the guarantee. Second, whether the balance of justice ought to favour the appellant in the light of Mr Wong's argument that the second respondent was not a bona fide purchaser.

Raja Aziz's response was as follows. As far as the balance of justice was concerned, the starting point vis-à-vis the second respondent must be the order of 23 January 1996. That order was the basis for his client's decision to complete the purchase and to have the lands transferred unto itself. It did not matter that prior to the making of the order, the second respondent had notice or even knowledge of the appellant's caveats. Such prior notice or knowledge was overreached by the very terms of the order made on 23 January 1996. Having regard to the terms of that order, the second respondent became a purchaser for value with notice of the fact that nothing was to happen *de futuro* to take away the lands from it. That order, which was not the subject of any appeal, was to the express effect that the sale to the second respondent could be completed. It therefore followed as a consequence that the lands could be transferred to the second respondent to enable it to deal with them as it pleased. Further, the appellant was, by his conduct, telling the second respondent to go ahead and complete the sale and put itself on the register. The appellant cannot be now heard to say otherwise. The appellant was not giving up his right in relation to his appeal as against the first respondent for the purpose of establishing that he had a caveatable interest in the land. That was possibly to avert a claim for damages for wrongful entry of the caveats. Although he was also going to pursue his claim against the first respondent, he had given up his right to re-enter his caveats and pursue a claim *in specie*. Since the second respondent had acted upon the terms of the order of 23 January 1996, there was no question of it being guilty of any inequitable conduct.

With these submissions, we agree. To accede to Mr Wong's argument would be to set at naught the effect of the order of 23 January 1996. The second respondent had, in good faith, accepted the order. The conduct of the appellant in all the circumstances of the case constituted encouragement upon which the second respondent acted. Suffice that it altered its position. There is no necessity that it did so to its detriment (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331). In our judgment, it would be wholly unjust and inequitable to permit the appellant to contend that the caveats should remain as against the second respondent which, in the light of the circumstances adumbrated by Raja Aziz in the course of his address to us, is entirely innocent.

There are other reasons which tilt the balance in favour of the second respondent. It has entered into security arrangements with financial

institutions to raise funds to develop the lands. It has effected sub-sales of subdivided plots to third party purchasers. If we were to direct a continuance of the order we made on 7 August 1996, the consequences would prove injurious to the second respondent and other innocent persons.

Taking into account all the relevant circumstances of the case, we are of the view that the balance of convenience favours the second respondent. We therefore discharged our order of 7 August 1996 directing the re-entry of the caveat. However, for the reasons already given earlier in this judgment, the appeal as against the first respondent was allowed to the extent that the appellant had a caveatable interest in the lands in question.

There still remained the question as to whether any protection ought to be afforded to the appellant pending the trial of his action. During the discussion that followed between members of the court and counsel, we asked Mr Abraham what had happened to the shares that had formed the consideration for the sale to the second respondent. He said that he was not immediately in a position to advise us on the matter. He said that if he was given sufficient time, he would get an officer of the first respondent to file an affidavit disclosing the answer to the question which we had raised. Mr Wong saw no objection to this rather reasonable request.

In order to formalize Mr Abraham's offer to put in evidence, we made an order directing Jessie Loh to swear and file an affidavit disclosing the whereabouts of the shares that formed the purchase consideration. We then reserved all orders, including the order we ought to make as to the costs of the proceedings before us to 24 August 1996. Well before that date, the first respondent put in an affidavit by Jessie Loh to which a response by the appellant was also delivered.

When the matter came up before us once again on 24 August 1996, Mr Wong asked us to make an order directing the first respondent to pay a sum of RM21m, being the adjusted purchase price, into court, as security to meet the appellant's claim in his suit against the first respondent. Mr Abraham strongly urged us not to do anything of the sort. He argued that this court was not seised of jurisdiction under s 69(4) of the Courts of Judicature Act 1964 ('the Act') to make the kind of order which Mr Wong had asked for. That section reads as follows:

> 69(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.'

It was also submitted that the order proposed by the appellant would amount to an undue preference of the appellant as a contingent creditor. We were also advised at that stage of the argument that the appellant had unsuccessfully applied for a Mareva injunction before the High Court, and that an appeal against its refusal was still pending before this court. Mr Abraham argued that if we were to make any kind of preservation order, it would seriously prejudice his client in the Mareva appeal.

We think that there is much force in the arguments advanced by Mr Abraham.

A In the first place, we agree with him that the power conferred by s 69(4) of the Act is confined to making ancillary orders that would have the effect of completely giving the remedy which this court intends to give when either allowing or dismissing an appeal. The decision of the Federal Court in *Rama Chandran v The Industrial Court of Malaysia* (Supreme Court Civil Appeal No 02–13–94, yet unreported), and of this court in B *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* (Court of Appeal Civil Appeal No W–04–109–95, yet unreported) afford illustrations of the kind of orders that may be made in the exercise of the power conferred by the section.

In the former case, the Federal Court found the dismissal of the C appellant workman to have been without just cause or excuse. It allowed the appeal and reversed the decision of the High Court refusing certiorari. Instead of remitting the case to the Industrial Court and thereby occasioning further delay, the Federal Court awarded compensation in lieu of reinstatement. The Federal Court had undoubted power to make that D order under r 51(4) of the Rules of the Supreme Court 1980 which was in terms identical to s 69(4) of the Act, and which, despite its repeal, applied to the appeal in question by reason of r 138 of the Rules of the Federal Court 1995.

In *Harris'* case, this court having found the respondent workmen to have been victimized for their trade union activities, upheld the order of E certiorari issued by the High Court and dismissed the employer's appeal. However, the order of the High Court was varied. The High Court's order remitting the case back to the Industrial Court was set aside, and in its place, an order of reinstatement was made.

Although *Rama Chandran* and *Harris* were both public law cases, F they exemplify the type of orders that may be made under s 69(4) of the Act when the Federal Court or this court allows or dismisses an appeal.

Secondly, if we were to make an order directing the first respondent to provide security to meet the appellant's claim in the suit brought by him, it would most certainly have the effect of pre-judging the merits of his G appeal against the refusal of a Mareva injunction. To do so — without having had the benefit of the reasons given by the learned judge — and having read the evidence adduced in support of and in opposition to that application, would occasion serious prejudice to the first respondent.

Lastly, we agree with Mr Abraham that to direct the provision of H security in this appeal would raise the spectre of undue preference in the appellant's favour. This court has very recently held that such an order is not to be made even in Mareva proceedings (see *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605).

For these reasons, we declined to make the order sought by Mr I Wong.

As for costs, Mr Abraham, with his customary frankness, conceded that this was entirely within our discretion. Taking into account all matters

relevant to the exercise of our discretion, we considered that the fair and just order that ought to be made in the circumstances of this case was to direct the first respondent to bear all the costs of this appeal, including the costs of the second respondent. The order of costs made in favour of the first respondent by the High Court was set aside. The first respondent was ordered to pay to the appellant the costs of the proceedings in the court below. The deposit paid into court by the appellant was ordered to be refunded to him.

Before concluding, we must express our gratitude to all counsel for the assistance they have rendered us in this rather difficult case.

Order accordingly.

Reported by Isabel Liong